85-1724

Supreme Court, U.S.
FILED
APR 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1985

* * * * * * * * * * * * * * * * * *

POLLY MCANNALLY UNDERWOOD,

Petitioner

vs.

STATE OF ALABAMA,

Respondent

* * * * * * * * * * * * * * * * * *

PETITION FOR A WRIT OF
CERTIORARI TO THE COURT
OF CRIMINAL APPEALS OF ALABAMA

* * * * * * * * * * * * * * * * * *

BRIEF OF PETITIONER

* * * * * * * * * * * * * * * * * *

J. LOUIS WILKINSON
503 Frank Nelson Building
Birmingham, Alabama 35203
(205) 252-4908
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QUESTIONS PRESENTED

1. Were the Petitioner's due process rights violated when the trial court allowed illegal testimony into evidence concerning the ultimate issue of fact for the jury, viz., in an arson case a deputy fire marshal was allowed to testify that the fire was "deliberately" set?

PARTIES

In the Circuit Court of Blount County, Alabama, the Court of Criminal Appeals of Alabama and the Supreme Court of Alabama, the parties were: The State of Alabama, who is the Respondent herein and Polly McAnnally Underwood, who is the Petitioner herein.

The matters at issue here were first raised in the Circuit Court of Blount County, Alabama, and have been at issue throughout these proceedings.

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Colvin v. State,
247 Ala. 55, 22 So.2d 548 (1945)

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Morland v. State,
373 So.2d 1259 (Ala.Cr.App. 1979)

TABLE OF CONSTITUTIONAL PROVISIONS

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Fifth Amendment

Fourteenth Amendment

OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Alabama affirming the Petitioner's conviction is not as yet reported but will be reported as follows:

Underwood v. State, _____ So. 2d _____ (Cr.App.Ala. 1985)

A copy of the same is submitted in Appendix "A" to this petition.

The order of the Alabama Supreme Court denying the Petitioner's writ of certiorari is not as yet reported as follows:

Ex Parte: Polly McAnnally Underwood
In re: Underwood v. State,
_____So.2d _____(S.Ct.Ala, 1986)

A copy of the same is submitted in Appendix "B" to this petition.

JURISDICTION

The order of the Supreme Court of Alabama wherein the writ of certiorari was denied was issued on February 21, 1986, and this petition is filed within sixty days of that date.

The Jurisdiction of this Honorable Court is invoked under 28 United States Code, Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved in Petitioner's writ include the Fifth Amendment to the Constitution of the United States, and the Fourteenth Amendment to the Constitution of the United States. A copy of these amendments are submitted as Appendix "C" to this petition.

STATEMENT OF THE CASE AND FACTS

I

The Petitioner was tried by a jury for second degree arson and a verdict of guilty was returned. She was sentenced to eight years in the State penitentiary and ordered to pay $35,000.00 restitution. As appeal followed to the Court of Criminal Appeals.

The basis of the Petitioner's appeal was as follows: her due process rights under the Fifth and Fourteenth Amendments to the United States Constitution were violated when the trial Court allowed the deputy fire marshal to testify that the fire had been "deliberately" set.

On October 8, 1985, the Court of Criminal Appeals of Alabama affirmed the conviction of the Circuit Court, the

opinion of which is submitted as Appendix "A" . An application for rehearing was filed in the Court of Criminal Appeals raising the same issues was denied without opinion on November 12, 1985.

Mrs. Underwood then petitioned the Supreme Court of Alabama for a writ of certiorari alleging the same issues. The petition was denied without opinion on February 21, 1986.

II

The petition is based on the following facts:

Petitioner rated a building in which she ran a beauty shop and cosmetology school. In January, 1982, the building "exploded" and partially burned. This occurred one night after the shop had closed for the day. Petitioner denied setting the

building on fire. A deputy fire marshall was allowed to testify, over objection, that the fire was deliberately set and that kerosene had been used as an accelerant.

ARGUMENT

Petitioner asserts to this Honorable Court that she was denied her due process rights under the Fifth and Fourteenth Amendments to the United States Constitution, when the trial judge allowed testimony that invaded the province of the jury and was the ultimate issue of fact for the jury to decide.

The petitioner was charged with arson and during the trial the deputy fire marshal was allowed to testify, over defense objections, that the fire had been "deliberately" set and kerosene was used as an accelerant. It is a direct violation of all due process rights for such testimont to be admitted in an arson case.

The Alabama Court of Criminal Appeals did not deny that it was error for the testimony to be admitted, instead, they

held that the objection interposed was not properly worded. However, the trial court, by the objection, was made aware of the erroneous question asked by the prosecutor, and was asked to rule.

Alabama has a long line of cases that specifically speak to the issue at hand but were apparently overlooked by our State courts.

In Hughes v. State, 412 So.2d 296 (Ala.Cr.App. 1982), the Alabama Court of Appeals held that it was improper to elicit testimony in an arson case as to whether the fire was "intentional" or "of incendiary origin" since it formed a conclusion that was for the jury to determine. It went on to say that

> " Even an expert may not give an opinion on the issue since the cause of a fire in the ultimate fact in an arson case."

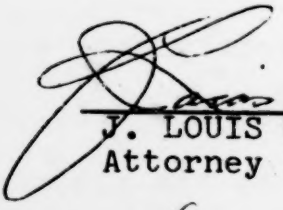
See also Morland v. State, 373 So.2d 1259 (Ala.Cr.App. 1979) and Colvin v. State, 247 Ala. 55, 22 So.2d 548 (1945).

It was certainly prejudicial error for the trial court to allow testimony of this nature since it was the very issue the jury was to decide. That is, whether the fire was deliberately set by someone. If that question is decided negatively by the jury then obviously there is no case of arson. But, when a trial court allows the question to be determined by an expert witness, then the court has taken the case away from the jury and actually let the witness decide the key issue. To do such is to deny a defendant a fair trial by due process of law.

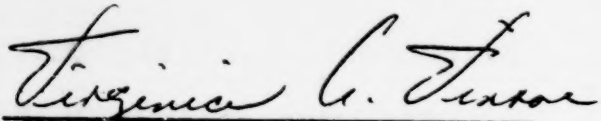
CONCLUSION

It is undisputed that the testimony of the deputy fire marshal is manifestly prejudicial, and as this Court has held on many occasions, the controlling principle is to ensure that all of our citizens are guaranteed the rights afforded them under our Constitution. As a citizen and a defendant in a criminal case, the Petitioner is guaranteed a fair and impartial trial by due process of law. The underlying and controlling principle in all criminal cases is that the accused be afforded due process of law. Such was not done in the instant case and the Petitioner was denied her rights under the Fifth and Fourteenth Amendments to the United States Constitution. A reversal of this case is mandated.

Respectfully submitted,



J. LOUIS WILKINSON
Attorney for Petitioner

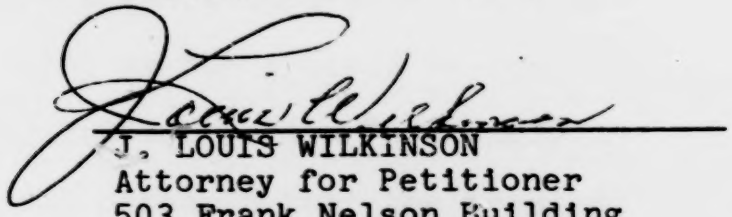


VIRGINIA A. VINSON
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been mailed to the attorneys for the Respondent, certified mail, this the 21 day of April, 1984, and addressed as follows:

Honorable Charles Graddick
Attorney General
205 Administrative Building
Montgomery, Alabama 36130



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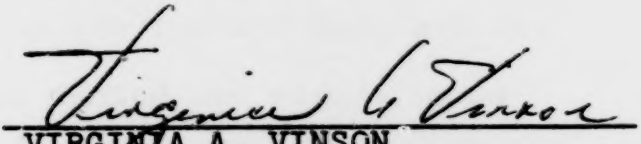

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APPENDIX

TO THE PETITION FOR A WRIT OF
CERTIORARI TO THE COURT OF CRIMINAL
APPEALS OF ALABAMA

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APPENDIX "A"

OCT 8 1985

THE STATE OF ALABAMA

JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1985-86

6 Div. 718

Polly McAnnally Underwood

v.

State

Appeal from Blount Circuit Court

BOWEN, PRESIDING JUDGE

Polly McAnnally Underwood was convicted of arson, second degree, in violation of Alabama Code 1975, § 13A-7-42, and was sentenced to eight years in the state penitentiary.

Underwood argues on appeal that the testimony of the deputy state fire marshal that the fire was "deliberately set" constituted reversible error.

Robert Massey, deputy state fire marshal, testified at trial in the following manner over appellant's objection:

> "Q. Mr. Massey, based on your knowledge and experience and your examination of this site do you have an opinion or judgment as to the cause of this fire?
>
> "A. Yes, sir.
>
> "MR. ROUNTREE (Defense Counsel): We're going to object. I

don't believe he's laid a proper predicate.

"THE COURT: Overruled.

"Q. An what is that, please sir?

"A. My opinion is that fire was deliberately set in at least three separate places. Kerosene was used in at least two separate places to accelerate the fire."

In Hughes v. State, 412 So.2d 296, 297-98 (Ala.Cr.App. 1982), this Court stated:

" It is clear that, over proper objection, the admission of testimony that a fire was 'intentional' or 'of incendiary origin' is reversible error. See Colvin v. State, 247 Ala. 55, 22 So.2d 548 (1945): Moreland v. State, Ala. Cr.App., 373 So.2d 1259 (1979). Even an expert may not give an opinion on the issue since the cause of a fire is the ultimate fact in an arson case. Moreland v. State, supra." (Emphasis added.)

However, the conviction in Hughes was affirmed because the error was not preserved.

> " In our judgment, . . appellant did not properly preserve the question for review. Appellant's initial objection seems to have been based on dual grounds, that the fire marshal had not been properly qualified as an expert and that the matter invaded the province of the jury. The district attorney, however, withdrew the question, proceeded to qualify the witness, and the trial court did not rule on the first objection. Review no appeal is limited to matters on which rulings are invoked in the court below. Gunn v. State, Ala. Cr.App., 387 So.2d 280, cert. denied, Ala., 387 So.2d 283 (1980).
>
> " A party must apprise the trial court of the basis for an objection with sufficient particularity to allow an informed decision to be made on the legal issue involved.

Bland v. State, Ala.Cr.App., 395 So.2d 164 (1981); Ward v. State, Ala.Cr.App., 376 So.2d 1112, cert. denied, Ala., 376 So.2d 1117 (1979)." Hughes, 412 So.2d at 298.

Here, also, the defendant failed to preserve the issue for appeal. At trial, the defendant's objection to Massey's testimony on the ground that a proper predicate had not been laid was properly overruled by the trial court. The defendant now contends, on appeal, that Massey's testimony invaded the province of the jury.

Where a specific objection is made and overruled, an appellate court will not consider any other grounds of objection. C. Gamble, McElroy's Alabama Evidence, § 426.01 (11) (3rd ed. 1977). "Further, it is well settled that all grounds of objections not specified are waived, and that the trial court

will not be placed in error on grounds not raised at trial." Reeves v. State, 456 So.2d 1156, 1160 (Ala.Cr.App. 1984).

For these reasons, the judgment of the trial court is due to be affirmed.

AFFIRMED.

All Judges Concur.

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
P. O. BOX 351
MONTGOMERY 36101

WILLIAM M. BOWEN, JR.
Presiding Judge
JOHN C. TYSON, III
SAM TAYLOR
JOHN PATTERSON
H. WARD McMILLAN
Judges

MOLLIE JORDON
Clerk
Ph. 261-4590

6th Div. 718

BLOUNT CIRCUIT COURT
CC84-060

POLLY McANNALLY UNDERWOOD vs. State of Alabama
Appellant Appellee

Dear Sir:

You are hereby notified that on November 12, 1985 the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

_____ Notice of Appeal filed. Future correspondence should refer to the above number.

_____ Record on Appeal filed. Date of Certificate of Completion of Record on Appeal: _____.
As to briefs, see Rules 28, 31 and 32, A.R.A.P.

____ On motion, record on appeal accepted and considered as timely filed in this Court.

____ Appellant granted seven (7) additional days to file Brief due on _____.

____ Appellee granted seven (7) additional days to file Brief due on _____.

____ Appellant granted seven (7) additional days to file reply brief . Brief due on_____.

____ Brief of Appellant filed. _____ Oral argument requested by appellant.

____ Oral argument request disallowed ; appeal submitted on briefs.

____ Appeal submitted to the Court for decision in the following manner:

____ Appeal affirmed. No opinion. Judgment not final, see Rule 41, A.R.A.P.

____ Appeal dismissed. No Opinion.

____ Application for rehearing and Rule 39 (k), A.R.A.P., motion filed.

____ Application for rehearing filed.

__X__ Application for rehearing overruled. No opinion. Judgment not final, see Rule 41, A.R.A.P.

____ Application for rehearing returned for non-compliance with Rule 40, A.R.A.P.

____ Appeal placed on rehearing ex mero motu.

____ Certificate of Final Judgment issued to Circuit Clerk.

____

/s/ Mollie Jordon
CLERK
COURT OF CRIMINAL APPEALS

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
P. O. BOX 351
MONTGOMERY 36101

February 28, 1986

WILLIAM M. BOWEN, JR.
Presiding Judge
JOHN C. TYSON, III
SAM TAYLOR
JOHN PATTERSON
H. WARD McMILLAN
Judges

MOLLIE JORDON
Clerk

Hon. J. Louis Wilkinson
Attorney at Law
Wilkinson, Purvis & Vinson
503 Frank Nelson Building
Birmingham, Alabama 35203

Re: 6 Div. 718
Polly McAnnally Underwood v. State
Blount Circuit Court No. CC84-060

Dear Sir:

The Court of Criminal Appeals has today granted a stay of sixty (60) days from February 21, 1986, to allow filing of a petition for writ of certiorari in the United States Supreme Court. This stay will remain in effect until action is taken on the petition, and if petition is granted, until a decision is rendered by the United States Supreme Court.

The certificate of final judgment has been recalled from the lower court pending determination by the United States Supreme Court, but the certificate will be reissued upon the expiration of the sixty-day stay unless this Court is notified by the United States Supreme Court of the filing of said petition in that Court.

Yours very truly,

/s/ Mollie Jordon

Clerk

cc: Clerk, Blount Circuit Court
Office of the Attorney General
File

APPENDIX "B"

THE STATE OF ALABAMA - JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

February 21, 1986

85-231

EX PARTE: POLLY McANNALLY UNDERWOOD

PETITION FOR WRIT OF CERTIORARI

(Re: Polly McAnnally Underwood v. State)

CCA 6/718

CERTIFICATE OF JUDGMENT
WRIT DENIED

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari be denied.

Costs taxed to petitioner.

ADAMS, J. - MADDOX DIVISION CONCURS.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court. Witness my hand this 21 day of Feb 19 86.

/s/ Robert G. Esdale

Clerk, Supreme Court of Alabama

APPENDIX "C"

a) United States Constitution - Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life, limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived og life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

b) United States Constitution - Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges ir immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CERTIFICATE OF SERVICE

I, J. Louis Wilkinson, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for Polly McAnnally Underwood, the Petitioner, do hereby certify that on this 21st day of April, 1986, I did serve the requisite number of copies of the foregoing on the Attorney General of the United States of Alabama, Respondent, by mailing same to them, first class postage prepaid and addressed as follows:

Honorable Charles Graddick
Office of the Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130

J. Louis Wilkinson

J. LOUIS WILKINSON
Attorney for Petitioner
503 Frank Nelson Building
Birmingham, Alabama 35203
(205) 252-4908